

From: Joel West
To: Microsoft ATR
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Subject: Microsoft settlement

The district court (upheld by the Court of Appeals) held that Microsoft had violated anti-trust statutes in its aggressive attempts to garner market share.

Normally this would mean that there are two types of remedies:

- 1) Ongoing monitoring of compliance with a settlement agreement;
- 2) A structural change that uses the power of the market (rather than judicial oversight) to assure ongoing compliance.

Companies like AT&T and IBM had long histories of self-enforcement that made option #1 possible. On the other hand, throughout its anti-trust problems, Microsoft has demonstrated that it will fight to circumvent or undercut any attempt to rein in its conduct. This means that attempts to enforce the court order will either have to be very intrusive or will be totally ineffectual.

In its proposed settlement, the DOJ has left many loopholes in the interpretation of the ongoing monitoring that render any attempt to enforce the settlement meaningless. Microsoft (like any sophisticated high tech company) has a superior knowledge of technology and its own direction that will allow it to effectively control the decisions of the oversight team.

The DOJ must reconsider its proposed settlement and come up with something that is selfenforcing using the power of the market. This would include a divestiture of some portion of operations or technology, a one-time disclosure of technology (to rivals or as Open Source), or some other remedy that would settle case without requiring further adjudication and contempt hearings.

Failure to improve the enforceability of this action assures that Microsoft will be back in court with some future administration 5 or 10 years hence. This creates a powerful uncertainty for the entire U.S. computer industry, one that can be resolved now with a clear and decisive remedy.

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Joel West, Ph.D. <joelwest@uci.edu>
Lecturer
UC Irvine Graduate School of Management
<http://www.gsm.uci.edu/~joelwest>